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In the

Supreme Court of the United States

LAKHDAR BOUMEDIENE, ET AL.,

Petitioners,

v.

GEORGE W. BUSH, ET AL.,

Respondents.

KHALED A.F. AL ODAH, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

The American Bar Association ("ABA") is the leading national membership organization of the legal profession. The ABA's membership of more than 413,000 spans all 50 states and includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and students.

The ABA's mission is "to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law." Among the ABA's goals is "[t]o increase public understanding of and respect for the law, the legal process, and the role of the legal profession" and "[t]o advance the rule of law in the world."[2] As the voice of the legal profession, the ABA has a special interest and responsibility in protecting the rights guaranteed by the Constitution, safeguarding the integrity of our legal system, and ensuring the sanctity of the rule of law.

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to its preparation or submission. Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[2] *See* ABA Mission and Association Goals, *available at* http://www.abanet.org/about/goals.html (last visited Aug. 20, 2007).

Preserving access to the writ of habeas corpus, which is essential to these goals, long has been a core ABA concern. Over the course of decades, the ABA has developed special competence in this area through its work to protect the habeas rights of persons deprived of their liberty by arrest or detention.

The ABA's efforts to promote the rule of law, both in this country and in other countries through its Rule of Law Initiative,[3] have confirmed that other fundamentally important legal protections depend upon the writ of habeas corpus. Quite simply, the rule of law has no force against a government that can arrest and detain persons at will with no judicial review. Thus, in working to establish legal systems in developing countries, the ABA has pressed for judicial review of the legality of executive detention.

The ABA has expressed its deep concern about the need to preserve the writ of habeas corpus at home, particularly after the events of September 11, 2001. In February 2002, the ABA's House of Delegates adopted a policy urging that proceedings before military tribunals guarantee the right to petition for habeas corpus, and that they comply with the International Covenant on Civil and Political Rights, which prohibits executive detention without judicial review. *8C Revised Recommendations* (adopted Feb. 2002).[4] In February 2003, the House of Delegates adopted a

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[3] *See* About the ABA Rule of Law Initiative, *available at* http://www.abanet.org/rol/about.shtml (describing the activities of the ABA's Rule of Law Initiative) (last visited Aug. 20, 2007).

[4] *Available at* http://www.abanet.org/poladv/letters/107th/militarytrib8c.pdf (last visited Aug. 20, 2007). The House of Delegates is the ABA's policymaking body, comprising more than 500 delegates and representing various entities within the ABA, as well as the legal profession as a whole. Reports that recommend the

policy urging meaningful judicial review of the status of alleged enemy combatants. While this policy refers to citizens and residents of the United States, the ABA also emphasized that "Congress and the Executive Branch should consider how the policy adopted by the United States may affect the response of other nations to future acts of terrorism." Task Force on Treatment of Enemy Combatants, *Revised Report 109* (adopted Feb. 10, 2003).[5]

When issues regarding habeas corpus have come to the fore in cases before United States courts, the ABA has advanced these same principles of the rule of law. The ABA filed briefs amicus curiae on behalf of petitioners before this Court in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004)[6], and before the United States Court of Appeals for the Second Circuit in *Padilla* v. *Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *rev'd* 542 U.S. 426 (2004)[7], urging in both cases that United States citizens and persons residing in the United States detained by the Executive Branch be afforded a meaningful opportunity to challenge the basis for their detention before

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adoption of specific policy positions are submitted by ABA sections, committees, affiliated organizations, state and local bar associations, and individual ABA members. The full House votes on the recommendations and those that are approved become official ABA policy. *See* ABA Leadership, House of Delegates – General Information, *available at* http://www.abanet.org/leadership/delegates.html (last visited Aug. 20, 2007).

5 *Available at* http://www.abanet.org/leadership/recommendations03/109.pdf (last visited Aug. 20, 2007).

6 *Available at* http://www.abanet.org/irr/hamdibrieffeb04.pdf (last visited Aug. 20, 2007).

7 *Available at* http://www.abanet.org/irr/padillabriefjuly03.pdf (last visited Aug. 20, 2007).

an independent judicial officer and to have assistance of counsel in making that challenge.

Because the ABA and its members have observed firsthand the importance of habeas corpus as "an important check on the power of executive detention," the ABA "strongly opposed" the provision of the Military Commissions Act of 2006 now at issue in this case, which seeks to strip courts of jurisdiction to consider existing habeas corpus claims for certain alien detainees in United States custody. Letter from Karen J. Mathis, President, American Bar Association, to United States Senators (Sept. 27, 2006).[8]

In a similar letter a year earlier, the ABA urged the Senate to reject similar jurisdiction-stripping provisions of the Detainee Treatment Act because

> [t]he principle of independent judicial review of governmental detention was important enough to our nation's founders to enshrine in the Constitution, not to be suspended by Congress except in the direst circumstances. Preserving the opportunity for Guantanamo detainees to seek habeas review in our federal courts will demonstrate our nation's commitment to its own constitutional values and serve as an important example to the rest of the world.

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[8] *Available at* http://www.abanet.org/poladv.letters/antiterror/060927letter_senmilcom.pdf (last visited Aug. 20, 2007).

Letter from Michael S. Greco, President, American Bar Association, to United States Senators (Nov. 14, 2005).[9]

Through its overseas programs and its interactions with bar associations in other countries, the ABA is keenly aware of the importance of America's leadership role in promoting the rule of law abroad. Members participating in Rule of Law Initiative programs or conducting business in other countries have observed that a common respect for the rule of law facilitates legal reform efforts abroad and protects American citizens abroad by allowing our government to insist that those citizens be treated according to international norms. From these experiences, the ABA also appreciates that limiting habeas rights not only would undermine the moral authority of the United States in promoting the rule of law, but also would have negative effects on the treatment of Americans abroad, our nation's ability to ensure fidelity to international agreements to which the United States is a party, and needed international cooperation in the fight against terrorism.

SUMMARY OF ARGUMENT

The writ of habeas corpus is the cornerstone of the rule of law and should not be weakened by exceptions of the kind relied on by the Court of Appeals. The Founders recognized the critical role of the writ in our Constitution. History, dating back to the Magna Carta, taught them that executive detention without judicial review is anathema to the rule of law. The inclusion of the Suspension Clause in the Constitution reflects their judgment that the writ is most needed when it, and the rule of law, are under the most intense assault and that exceptions to the writ, even in times

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[9] *Available at* http://www.abanet.org/poladv/letters/antiterror/051114letter_detainees.pdf (last visited Aug. 20, 2007).

of emergency, are inconsistent with the rule of law and threaten to produce tyranny. Hence, only in time of rebellion or invasion does the Constitution authorize Congress to suspend the writ. Now is not such a time.

Exclusion of Guantanamo detainees from the protections of habeas corpus on the ground that Guantanamo is not "sovereign territory" of the United States is the very kind of evasion of the writ that the Suspension Clause sought to prevent. Such a limitation of the writ would permit the creation of a law-free zone where individuals could be deprived of their liberty without adequate judicial review. This is incompatible with the rule of law.

In significant part due to the leadership of the United States, the concept of the Great Writ is now almost universally accepted by the world community. The ABA, in its efforts to promote the rule of law in developing countries, has emphasized the fundamental importance of judicial review of detention. Detentions at Guantanamo – in most cases for more than five years – without adequate judicial review, however, have undermined the leadership role heretofore exercised by the United States in the world community. Reaffirming the rights to habeas corpus of the detainees presently before this Court would help restore our nation's traditional role as the symbol of liberty and the rule of law.

ARGUMENT

I. Habeas Corpus Is Fundamental to Our Constitutional Scheme and Only the Most Narrowly Limited Exceptions to Its Availability Are Permissible.

The ABA's efforts in support of habeas corpus in this country and in training lawyers in developing countries

reflect an appreciation of its critical role from the very inception of our constitutional system. The Founders recognized that the writ was one of the essential protections needed to establish a government of laws, not men, and that it was necessary to ensure that the great purposes of the writ would not be undermined by evasive strategies designed by the Executive Branch or exceptions enacted by Congress. Accordingly, the Founders enacted Article I, Section 9, Clause 2 of the Constitution, which provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it" (the "Suspension Clause"). Since that time, this Court has consistently applied the writ to "a wide variety of cases involving executive detention, in wartime as well as in times of peace." *Rasul* v. *Bush*, 542 U.S. 466, 474 (2004).

The Suspension Clause reflects the Founders' recognition of the lessons taught by English history, from the principle established in Magna Carta "that the king is and shall be below the law" (Frederick Pollock & Frederic W. Maitland, 1 *The History of English Law* 173 (2d ed. 1923)), to the efforts by Parliament in the 17th century to prevent monarchs from evading the writ of habeas corpus.

For example, during the Protectorate period that followed the English Civil War, prisoners were moved between jails to prevent service of habeas corpus petitions, or sent to overseas prisons to avoid the reach of the courts altogether. *See* William F. Duker, *A Constitutional History of Habeas Corpus* 48-53 (1980). Parliament, however, refused to accept these practices. In 1667, Parliament impeached Edward Hyde, Earl of Clarendon, because, among other things:

> he hath advised and procured divers of his majesty's subjects to be imprisoned against law, in remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law, and to produce precedents for imprisoning any other of his majesty's subjects in like manner.

Duker, *supra*, at 53 (quoting Proceedings in Parliament against Edward Earl of Clarendon, Lord High Chancellor of England, (1663-1667) 6 St. Tr. 291).

To curb such practices, Parliament enacted the Habeas Corpus Act of 1679, 31 Car. 2, c.2 (1679). While the Act itself did not cure all deficiencies, "[p]erhaps the most important thing the Act did was to . . . demonstrate that abuses with respect to habeas corpus would not be tolerated." R.J. Sharpe, *The Law of Habeas Corpus* 19 (2d ed. 1989). Thus, the Act "established the principle that the efficacy of habeas corpus is not to be thwarted." *Id.* at 20.

It was with the knowledge of the Great Writ's history that the Founders adopted the Suspension Clause. The Founders recognized habeas corpus to be an essential pillar of the rule of law. Thomas Jefferson identified habeas corpus as one of the "essential principles of our Government" (Thomas Jefferson, First Inaugural (Mar. 4, 1802), *reprinted in Inaugural Addresses of the Presidents of the United States*, S. Doc. No. 101-10, at 16 (1989)), stating that the new Constitution must protect "the eternal & unremitting force of the habeas corpus laws" (Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* 8 *Documentary History of the Ratification of the Constitution* 250 (1988)). James Madison extolled the writ as a "sacred" principle in the "administration of preventative justice." 4 *Debates in the Several State Conventions on the Adoption of the Federal*

Constitution, as Recommended by the General Convention at Philadelphia in 1787 555 (Jonathan Elliot ed., 2d ed. 1881). Alexander Hamilton declared that "the practice of arbitrary imprisonments, [has] been, in all ages, the favorite and most formidable instrument of tyranny." The Federalist No. 84, at 474 (Isaac Kramnick ed. 1987).

The English monarch's repeated attempts to circumvent the writ and the frequent suspension of habeas by Parliament itself[10] made the Founders wary of creating any exceptions to the protections of habeas corpus. They also recognized that the writ would come under assault, often when the rule of law was most at risk. Thus, they not only refused to give the Executive Branch power to restrict the writ but also tightly limited Congress' power to do so.

At the Constitutional Convention, Charles Pinckney introduced proposed language providing that "the Writ of Habeas corpus . . . shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited period not exceeding . . . months." 2 *The Records of the Federal Convention of 1787* 341 (Max Farrand ed., 3d ed. 1966). Objecting that this language was not strong enough, Edward Rutledge proposed that habeas corpus be declared "inviolable" as he could envision no justification for its suspension. *Id.* at 438. Finally, Gouveneur Morris offered the compromise that became the Suspension Clause (with some minor changes in capitalization): "The privilege of the writ of Habeas Corpus shall not be suspended, unless where in cases of Rebellion or invasion the public safety may require it." *Id.* Thus the Founders considered, but refused to allow, exceptions to the writ even for "the most urgent and

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[10] *See, e.g.*, Rex A. Collings, Jr., *Habeas Corpus for Convicts – Constitutional Right or Legislative Grace?*, 40 Cal. L. Rev. 335, 339-40 (1952).

pressing occasions," instead restricting suspensions to "Rebellion or invasion."

Tellingly, while specific guarantees of individual liberties were added to the original Constitution by the Bill of Rights and later amendments, the Suspension Clause is a guarantor of liberty found in the original Constitution. Its placement there, together with prohibitions on ex post facto laws and bills of attainder, reflects its role as one of the principal bulwarks against Executive and Legislative tyranny. Like the separation of powers and judicial independence, the Suspension Clause is part of the fundamental structure of the Constitution intended to preserve the rule of law.

This Court has "constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme." *Johnson* v. *Avery*, 393 U.S. 483, 485 (1969) (citation omitted). As this Court once observed: "It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired." *Bowen* v. *Johnston*, 306 U.S. 19, 26 (1939) (citation omitted).

II. The Denial of Habeas Corpus to Guantanamo Detainees Is Inconsistent with the Constitution and the Rule of Law.

The Court of Appeals' holding that Petitioners may be denied habeas corpus because Guantanamo is not a "sovereign territory" of the United States is the very kind of limitation of the writ the Founders intended to prevent when they adopted the Suspension Clause. Such a distinction creates an area where individual rights are not judicially enforceable, thus undermining the most fundamental attribute of the rule of law. Moreover, it is difficult to assert that

developing countries should follow the rule of law if our government can create an area where the writ is not recognized. Affirmance of Petitioners' right to habeas corpus will not only be consistent with the original intent of the Founders, but will also be consistent with our nation's commitment to promoting the rule of law in the world community.

A. A "Sovereign Territory" Limitation Is Inconsistent with the Constitutional Role of the Writ of Habeas Corpus and the Rule of Law.

The Writ of Habeas Corpus provides the opportunity for a searching review by an impartial tribunal of the legal and factual basis for detention.[11] Without full habeas and all of its attendant procedural rights – the right to review evidence, the right to an attorney, the right to introduce one's own evidence[12] – anyone detained will not have a meaningful

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[11] *See INS.* v. *St. Cyr*, 533 U.S. 289, 304-305 (2001) ("The writ of habeas corpus has always been available to review the legality of executive detention") (citations omitted); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 125, 130 (1807) (Marshall, C.J.) (court required to "fully examine[] and attentively consider[]" the facts and testimony on which the habeas petitioners were imprisoned); *see also Harris* v. *Nelson*, 394 U.S. 286, 298 (1969) ("Petitioners in habeas corpus proceedings, as the Congress and this Court have emphasized . . . are entitled to careful consideration and plenary processing of their claims including full opportunity for presentation of the relevant facts."). *See also, e.g.*, United Nations International Covenant on Civil and Political Rights ("ICCPR"), art. 9, § 4, *entered into force* Mar. 23, 1976, 999 U.N.T.S. 717 (ratified by the United States on June 8, 1992).

[12] *See Harris*, 394 U.S. at 298 (petitioners in habeas proceedings are entitled to seek and introduce evidence); *Al Odah* v. *United States*, 346 F. Supp. 2d 1, 8 (D.D.C. 2004) (". . . Petitioners are entitled to counsel . . . in order to properly litigate the habeas petitions . . .

opportunity to demonstrate that "error, neglect or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law." *Harris,* 394 U.S. at 292.

The Court of Appeals nevertheless upheld the denial of the writ based on the ground that Guantanamo, although subject to the exclusive jurisdiction of the United States under an indefinite lease that Cuba is powerless to terminate, is nonetheless not "sovereign territory" of the United States. The denial of habeas based on such a distinction is at odds with the history and language of the Suspension Clause and the great purposes of the writ as a cornerstone of the rule of law. It constitutes the very type of evasion of the writ that the Suspension Clause was designed to prevent.

The ABA recognizes the pressures on the Executive Branch to consider every measure possible to protect the nation in times of peril. History cautions, however, that it is just such pressures and just such times that can undermine basic liberties essential to the rule of law. It was precisely for that reason that the Founders, in framing the Suspension Clause, rejected language that would have given Congress power to suspend the writ in "the most pressing and urgent conditions" and limited such power solely to cases of rebellion and invasion. *See* pp. 8-10, *supra.*

This Court's analysis in *Rasul* confirms that the availability of the historic function of the writ as a safeguard of individual liberty should not turn on geographical niceties such as those relied upon here. As the Court explained:

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before the Court and in the interest of justice."); *cf. Crawford* v. *Washington,* 541 U.S. 36, 49 (2004) ("[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine.") (citation omitted).

> As Lord Mansfield wrote in 1759, even if a territory was "no part of the realm," there was "no doubt" as to the court's power to issue writs of habeas corpus if the territory was "under the subjection of the Crown." *King* v. *Cowle*, 2 Burr. 834, 854-855, 97 Eng. Rep. 587, 598-599 (K.B.) Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of "the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown." *Ex parte Mwenya* [1960] 1 Q.B. 241, 303 (C.A.) (Lord Evershed, M.R.).

Rasul, 542 U.S. at 482.

The Judiciary Act of 1789, enacted contemporaneously with the Constitution, demonstrates that the Founders did not rely on such "formal notions of territorial sovereignty" but on the practical realities of government detention. Thus the 1789 Act provided that federal courts are authorized to entertain petitions for the writ of habeas corpus from prisoners "where they are in custody, under or by colour of the authority of the United States . . . ." Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82. *See also Ex parte Bollman*, 8 U.S. at 95 (noting that the Judiciary Act of 1789 "was passed by the first congress of the United States . . . [a]cting under the immediate influence of [the Suspension Clause], [and] they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity"); *accord Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983) (an act "'passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty

evidence of its true meaning'") (quoting *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)).

The same considerations of the practical realities that require the exercise of the writ as a safeguard against arbitrary detention were reflected in *Rasul*, when this Court, in distinguishing *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), stated that the detainees in *Eisentrager* were proven enemy aliens who were captured, tried and convicted of war crimes in China and imprisoned in occupied Germany while:

> [The individuals held in Guantanamo] are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

Rasul, 542 U.S. at 475-76.

Justice Kennedy, in his concurrence in *Rasul*, stated that for purposes of determining application of the writ,

> [w]hat matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the "implied protection" of the United States to it.

Id. at 487 (Kennedy, J., concurring), quoting *Eisentrager*, 339 U.S. at 777-78. Justice Kennedy also stated that, unlike

the prisoners in *Eisentrager*, "the detainees at Guantanamo Bay are being held indefinitely, and without benefit of any legal proceeding to determine their status." *Id.* at 487-88.

Moreover, Justice Kennedy viewed *Eisentrager* as reflecting separation of powers concerns that required a consideration of all the circumstances to determine whether they involved "a realm of political authority over military affairs where the judicial power may not enter" or whether they dictated that "the courts maintain the power and responsibility to protect persons from unlawful detention even where military affairs are implicated." *Id.* at 487. After noting that the petitioners in *Eisentrager* had been convicted of violating the laws of war after a trial before a military commission, he explained:

> Indefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus. Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.

Id. at 488.

The language and history of the Suspension Clause and its essential role in maintaining the rule of law create a heavy presumption against limits on the judicial power to "protect persons from unlawful detention . . . ." *Id.* at 487. As both the *Rasul* majority's opinion and Justice Kennedy's

concurrence make clear, no "military exigencies" are present here that might overcome this presumption.

Finally, the government's argument that the Detainee Treatment Act ("DTA") provides an adequate substitute for habeas should be rejected. As Petitioners and others have urged, review provided by the DTA fails to satisfy the minimum requirements of due process because it is limited to review by the Court of Appeals for the District of Columbia of whether Combatant Status Review Tribunal ("CSRT") proceedings designating the detainee an "enemy combatant" conform to the standards and procedures of the Department of Defense ("DoD").[13] *See Boumediene* v. *Bush*, 476 F.3d 981, 1005-07 (D.C. Cir. 2007) (Rogers, J., dissenting); Brief of El-Banna Petitioners in *Al Odah*, Argument III; *see also* Brief of Amicus Curiae The Association of the Bar of the City of New York in Support of Petitioners.

In a CSRT proceeding, the detainee lacks assistance of counsel, and the tribunal consists of military officers who are informed at the outset that their DoD superiors have already determined these prisoners to be enemy combatants.[14] Moreover, the detainee is denied access to classified information that forms the basis for the determination and is frequently denied any realistic

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[13] Detainee Treatment Act of 2005, §1005(e), Pub. L. No. 109-148, 119 Stat. 2680 (2005), *amended by* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

[14] *See* Memorandum from Deputy Secretary of Defense Gordon England, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba (July 14, 2006), *available at* http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf (last visited Aug. 20, 2007).

opportunity to submit evidence or testimony in his defense.[15] Conformance to such standards and procedures is not an adequate substitute for habeas corpus review.

B. Reaffirmation of Guantanamo Detainees' Right to Habeas Corpus Will Help Restore the United States' Role as a Model for the Rule of Law In the World Community.

The principle of habeas corpus has now gained wide acceptance as essential to the rule of law, as is reflected in international human rights treaties, conventions and jurisprudence. This is due in substantial part to the leadership role of the United States and its efforts to promote the rule of law.

The ABA has played a role in those efforts through its Rule of Law Initiative, assisting countries – including the former Soviet republics and countries in Europe, Eurasia, Asia, Africa, the Middle East and Latin America – to develop and implement legal reforms and respect for the rule of law in all nations.[16] The training programs that the ABA conducts for attorneys and judges in these countries emphasize that the writ is essential to ensuring governance under the rule of law.[17]

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[15] *See* Joshua Denbeaux & Mark Denbeaux, *No-Hearing Hearings: CSRT: The Modern Habeas Corpus?* 2-3 (2006), *available at* http://law.shu.edu/news/final_no_hearing_hearings_report.pdf (last visited Aug. 20, 2007).

[16] *See* About the ABA Rule of Law Initiative, *available at* http://www.abanet.org/rol/about.shtml (last visited Aug. 20, 2007).

[17] *See* Judicial Reform Programs, *available at* http://www.abanet.org/rol/programs/judicial-reform.html and Legal Profession Reform Programs, *available at* http://www.abanet.org/rol/programs/legal-

The United States played a primary role in the design and adoption of the Universal Declaration of Human Rights, which establishes the right to be protected from arbitrary detention as one of the "equal and inalienable" rights of all peoples.[18] Similarly, the International Covenant on Civil and Political Rights, to which the United States is a party, provides that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[19] Similar provisions are now found in the American Convention on Human Rights, the American Declaration of the Rights and Duties of Man, the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), and the African Charter on Human and Peoples' Rights.[20]

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profession.html (describing the ABA's international training programs for judges and attorneys) (last visited Aug. 20, 2007).

[18] Universal Declaration of Human Rights, preamble, art. 9, G.A. Res. 217A (III), U.N. Doc. A/810 (1948). For the role of the United States in the drafting and adoption of the Universal Declaration, see Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001).

[19] ICCPR art. 9, § 4.

[20] Organization of American States, American Convention on Human Rights, art. 7, Nov. 22, 1969, *entered into force* July 18, 1978, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, (signed by the United States June 1, 1977); Organization of American States, American Declaration of the Rights and Duties of Man, art. XXV (1948) 9th Int'l Conference of American States, O.A.S. Official Record, OEA/Ser.L/V./II.23, doc.21 rev.6 (adopted by the O.A.S., including the United States); [European] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5, Nov. 4, 1950, *entered into force* Sept. 3, 1953, 213 U.N.T.S. 221; Organization of

The prohibition of detention without judicial review is now a fundamental principle of international law. *See, e.g.*, Restatement (Third) of Foreign Relations § 702(e) (1987) ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention."). It is also a basis on which the United States judges the commitment of other countries to the rule of law. *See, e.g.*, U.S. Department of State, *Country Report on Human Rights Practices 2006 in Egypt*, March 6, 2007; U.S. Department of State, *Country Report on Human Rights Practices 2006 in Burma*, March 6, 2007.

In the past half century, as terrorism has increased throughout the world, foreign national and international courts have upheld the right to judicial review of detention notwithstanding serious security challenges.

The influence of the United States is made explicit in a recent decision of the Canadian Supreme Court, which relied in part on this Court's decision in *Rasul*. In that case, the Canadian Supreme Court struck down legislation permitting detention up to 120 days without judicial review for foreign nationals deemed ineligible to remain in Canada for security reasons. *Charkaoui* v. *Canada (Citizenship and Immigration)*, S.C.C. 9, (Feb. 23, 2007).[21] Observing that "[i]t is an ancient and venerable principle that no person shall lose his or her liberty without due process according to the law, which must involve a meaningful judicial process," *id.* ¶ 28 (citation and internal quotation marks omitted), the court held that "foreign nationals, like others, have the right to

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African Unity, African Charter on Human and People's Rights, art. 6 and art. 7, June 27, 1981, *entered into force* Oct. 21, 1986, 21 I.L.M. 58.

[21] *Available at* http://scc.lexum.umontreal.ca/en/2007/2007scc9/2007scc9.html (last visited Aug. 20, 2007).

prompt review to ensure that their detention complies with the law." *Id.* ¶ 90 (citing, *inter alia*, *Rasul* v. *Bush*, 542 U.S. 466 (2004)).

Other cases in this area show the influence of the Anglo-American principle of habeas corpus. Thus, in *Aksoy* v. *Turkey*, 23 Eur. Ct. H.R. 533 (1996), the European Court of Human Rights held that Turkey had violated Article 5 of the European Convention by holding a suspected terrorist for fourteen days without bringing him before a court. It concluded:

> Article 5 . . . enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5(3), which is intended to minimize the risk of arbitrariness and to ensure the rule of law.

Id. ¶ 76 (citation omitted).

National courts of the United Kingdom and Israel have recently reaffirmed the principles of habeas corpus, holding that anyone subject to executive detention has the right to have his or her case heard by a court, notwithstanding claims that such detentions are necessary to combat terrorism.

In *A* v. *Secretary of State for the Home Department*, [2004] UKHL 56, the House of Lords invalidated a provision in the Anti-terrorism, Crime and Security Act 2001, which permitted the detention of suspected alien terrorists who, temporarily or indefinitely, could not be removed from the United Kingdom. As Lord Nicholls of Birkenhead observed,

"[i]ndefinite imprisonment without charge or trial is anathema in any country which observes the rule of law." *Id.* ¶ 74.

And, in 2002, the Israeli Supreme Court deemed illegal two orders permitting the detention of suspected terrorists in the West Bank for up to eighteen days without judicial review. HCJ 3239/02 *Marab* v. *IDF Commander in the West Bank*, [2002] Isr SC 57(2)349. The court held that "the question of detention is to be brought promptly before a judge or other official with judicial authority" regardless of the circumstances because "[j]udicial intervention stands before arbitrariness; it is essential to the principle of rule of law." *Id.* ¶¶ 26, 27; *see also* ¶ 32.

Throughout the world, treaties, cases, and constitutions reflect the United States' influence and leadership in promoting the rule of law. The indefinite detention of prisoners at Guantanamo without meaningful judicial review, however, has led many of our allies to question our departure from principles that we have been so instrumental in developing.

On February 15, 2006, five special rapporteurs from the United Nations issued a report in which they concluded that: "[T]he legal regime applied to these [Guantanamo] detainees seriously undermines the rule of law and a number of fundamental universally recognized human rights, which are the essence of democratic societies. These include the right to challenge the lawfulness of the detention before a court and the right to a fair trial by a competent, independent and impartial court of law . . . ." U.N. Econ. & Soc. Council, Report of the Chairperson of the Working Group on Arbitrary Detention, *Situation of detainees at Guantanamo Bay*, ¶ 17, U.N. Doc. E/CN.4/2006/120 (Feb. 27, 2006) (internal citations omitted).

The United States' closest allies have urged the United States government to follow the principles that it has so long advocated to others. On February 12, 2006, the European Parliament issued a resolution calling on the United States to close Guantanamo and ensure that every prisoner be "tried without delay in a fair and public hearing by a competent, independent, impartial tribunal." Eur. Parl., *European Parliament Resolution on Guantanamo*, P6_TA(2006)0070. In a recent speech to the ABA House of Delegates, Lord Peter Goldsmith, then Attorney General of the United Kingdom, reminded the ABA that, with respect to the treatment of detainees at Guantanamo, the threat of terrorism "does not mean that we have an unlimited license to throw away our values for the sake of expediency" and that the rule of law requires "subjecting executive action to the scrutiny of the democratic institutions and also of the courts, for judicial scrutiny is a key part of the rule of law."[22]

Reaffirmation and restoration of the rights of the Guantanamo detainees to habeas corpus is consistent with our nation's well-earned reputation as the leading advocate and model for the rule of law. Respect for the rule of law encourages its adoption abroad, solidifies our relations with other nations, and protects Americans abroad. The denial of habeas corpus to Guantanamo detainees undermines these important goals.

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The writ of habeas corpus has been described as the "best example" of "archetypes" of the law that "sum up the

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[22] American Bar Association: Lord Peter Goldsmith, Attorney General United Kingdom Addresses House of Delegates (speech delivered Feb. 12, 2007), *available at* http://www.abavideonews.org/ABA404/av.php#rss (last visited Aug. 20, 2007).

spirit of a whole body of law that goes beyond what they may be thought to require on their own terms." Jeremy Waldron, *Torture and Positive Law*, 105 Colum. L. Rev. 1681, 1723-24 (2005). As Professor Waldron observes, habeas is archetypical "of our legal tradition's emphasis on liberty and freedom from physical confinement . . . [and] of the law's opposition to arbitrariness in regard to actions that have an impact on that right." *Id.* at 1724. Weakening the Great Writ through an exception like that adopted by the Court of Appeals would undermine those principles and the very system of the rule of law envisioned by the Founders.

CONCLUSION

Accordingly, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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